APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 9, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7194

ALAN D. BOLINGER, JR.

Appellant,

vs.

THOMAS RIDGE, Individually and in his capacity as Governor of the Commonwealth of Pennsylvania; GARY CROWELL, Individually and his official capacity as Secretary of the Department of General Services of the Commonwealth of Pennsylvania; JOHN R. MCCARTY, Individually and in his official capacity as Deputy Secretary for the Administration of the Department of General Services of the Commonwealth of Pennsylvania; GREGORY C. SANTORO, Individually and in his official capacity as Chief Counsel for the Department of General Services of the Commonwealth of Pennsylvania; GREGORY A. GREEN, Individually and in his official capacity as Director of the Bureau of Personnel for the Department of General Services of the Commonwealth of Pennsylvania; THOMAS G. PAESE, Individually and in his official capacity as the Secretary of Administration of the Commonwealth of Pennsylvania; PAUL A. TUFANO, Individually and in his official capacity as General Counsel of the Commonwealth of Pennsylvania.

Appendix A

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 97-01342)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
February 19, 1999

BEFORE: GREENBERG, LEWIS and BRIGHT,*
Circuit Judges.

(Filed MAR 09, 1999)

MEMORANDUM OPINION OF THE COURT

LEWIS, *Circuit Judge*.

Alan Bolinger appeals the District Court's order granting summary judgment to appellees Gary Crowell and John McCarty. For the following reasons, we will affirm.

I.

Bolinger is a Capitol police officer employed by the Department of General Services ("DGS"), an agency of the Commonwealth of Pennsylvania. Crowell is the Secretary of DGS, and McCarty is the Deputy Secretary for

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Administration of DGS. On September 3, 1995, Bolinger was arrested and charged with disorderly conduct, resisting arrest, public drunkenness and criminal mischief. On September 6, 1995, McCarty suspended Bolinger without pay pending review of the criminal charges. On October 17, 1995, with the criminal charges still pending, McCarty terminated Bolinger's employment.[1] McCarty executed these orders under the direction of Crowell, and without filing formal charges or holding a pre-disciplinary hearing. However, the union filed grievances in protest of Bolinger's suspension and dismissal, which McCarty subsequently denied.

On July 18, 1996, Bolinger pleaded guilty to one charge of summary harassment. All other charges against him were dropped. On February 25, 1997, at Bolinger's request, the parties entered into a grievance arbitration hearing. However, before the hearing concluded, the parties reached a settlement agreement. Pursuant to the settlement agreement, DGS reinstated Bolinger and granted him back pay, benefits, and seniority dating back his guilty plea.

On September 3, 1997, Bolinger filed suit under 42 U.S.C. § 1983, alleging that his suspension and termination violated his Fourteenth Amendment right to due process. On November 14, 1997, the District Court dismissed Bolinger's claims against all defendants except for Crowell and McCarty, and all claims except those arising from his

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1. Under Pennsylvania's Civil Service Law, no civil service employee can be suspended for more than thirty working days in one calendar year. *See* 7 Pa. Stat. Ann. § 741.803. Thus, by October 17, 1995, Bolinger's allowable period of suspension had expired.

termination. On January 15, 1998, the parties filed cross-motions for summary judgment and entered into a stipulation of facts. On March 2, 1998, the District Court granted summary judgment in favor of Crowell and McCarty. This appeal followed.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over a District Court's grant of summary judgment, and apply the same test that the District Court should have applied. *Ersek v. Township of Springfield*, 102 F.3d 79, 83 (3d Cir. 1996).

II.

On appeal, Bolinger alleges that McCarty and Crowell violated his Fourteenth Amendment right to due process when they fired him without the benefit of a pre-disciplinary hearing. To evaluate this claim, we must weigh: (1) the government's interests in taking the official action; (2) the private interest affected by the official action; and (3) the risk that this interest was erroneously deprived by the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

After examining these factors, we conclude that the governmental interest in terminating Bolinger outweighed any deprivation that he might have suffered. It is clear that the government had a very strong interest in removing Bolinger from active duty as a Capitol police officer until the criminal charges against him were resolved. *See Gilbert v. Homar*, 117 S. Ct. 1807, 1813 (1997). Conversely,

Bolinger's interest in a pre-disciplinary hearing, while not trivial, was considerably weaker given that he had access to, and availed himself of, the grievance and arbitration procedures that eventually lead to his reinstatement. *See Dykes v. SEPTA* 68 F.3d 1564, 1571-72 (3d Cir. 1995). In addition, Bolinger had already been suspended without pay at the time he was fired, thus, his termination technically did not affect his interest.

Finally, the risk of error and the probative value of additional substitute procedural safeguards was low. There was no risk that Bolinger's termination was based on erroneous information because McCarty and Crowell terminated Bolinger after confirming that he had been arrested and charged with criminal conduct. Moreover, given Pennsylvania's thirty-day limitation on suspension, even if a disciplinary hearing had been held, McCarty and Crowell still would have faced the dilemma of whether to reinstate Bolinger with the criminal charges pending or to terminate him. We cannot envision a substitute procedure that would have avoided this problem.

Accordingly, we find that the District Court did not err in granting summary judgment to McCarty and Crowell.

III.

For the foregoing reasons, we will affirm the District Court's judgment.

Appendix A

TO THE CLERK:

Please file the foregoing opinion.

s/ [illegible]
Circuit Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 9, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7194

ALAN D. BOLINGER, JR.

Appellant,

vs.

THOMAS RIDGE, Individually and in his capacity as Governor of the Commonwealth of Pennsylvania; GARY CROWELL, Individually and in his official capacity as Secretary of the Department of General Services of the Commonwealth of Pennsylvania; JOHN R. MCCARTY, Individually and in his official capacity as Deputy Secretary for the Administration of the Department of General Services of the Commonwealth of Pennsylvania; GREGORY C. SANTORO, Individually and in his official capacity as Chief Counsel for the Department of General Services of the Commonwealth of Pennsylvania; GREGORY A. GREEN, Individually and in his official capacity as Director of the Bureau of Personnel for the Department of General Services of the Commonwealth of Pennsylvania; THOMAS G. PAESE, Individually and in his official capacity as the Secretary of Administration of the Commonwealth of Pennsylvania; PAUL A. TUFANO, Individually and in his official capacity as General Counsel of the Commonwealth of Pennsylvania.

Appendix B

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 97-01342)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
February 19, 1999

BEFORE: GREENBERG, LEWIS and BRIGHT,**
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on February 19, 1999.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the district court entered on March 2, 1998, be and the same is hereby **AFFIRMED**.

Costs taxed against appellant.

ATTEST:

s/ P. Douglas Sisk
Clerk

DATE: MAR 09 1999

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED MARCH 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

MEMORANDUM

This is a civil rights action, arising from alleged due process violations in Plaintiff's suspension without pay, and subsequent termination, from his position as a Capitol Police Officer. Before us are cross-motions for summary judgment.

I. *Background*

Plaintiff is an officer of the Capitol Police, employed by the Commonwealth of Pennsylvania through the Department of General Services ("DGS"). (Stip. ¶¶ 1-2).

Appendix C

Defendants, Gary E. Crowell and John R. McCarty, are DGS administrators. The employment relationship between Plaintiff and Defendants was governed by the collective bargaining agreement between the Commonwealth and the Fraternal Order of Police. (Stip. ¶ 4).

On September 3, 1995, Plaintiff was arrested at his residence and charged with disorderly conduct, resisting arrest, public drunkenness, and criminal mischief. (Stip. ¶ 5). On September 6, 1995, McCarty, acting under the direction of Crowell, suspended Plaintiff without pay. (Stip. ¶ 6). While suspended, Plaintiff did not receive any compensation or benefits. (Stip. ¶ 26).

On September 14, 1995, Plaintiff's union filed a grievance on his behalf. (Stip. ¶¶ 8-9). McCarty denied the grievance on September 29, 1995. (Stip. ¶ 10).

McCarty, again at Crowell's direction, terminated Plaintiff on October 17, 1995. (Stip. ¶ 11). The union filed a grievance in response on October 27, (Stip. ¶ 13), which was denied by McCarty on November 7, (Stip. ¶ 15).

On May 21, 1996, the Bureau of Labor Relations denied several subsequent grievances filed by Plaintiff protesting his termination. (Stip. ¶¶ 16-17). On June 6, 1996, Plaintiff gave notice of his desire to have the matter submitted to arbitration. (Stip. ¶ 18).

On July 18, 1996, Plaintiff pled guilty to one charge of summary harassment in the Lancaster County Court of Common Pleas. (Stip. ¶ 19). The remaining criminal charges against Plaintiff were dropped. (Stip. ¶¶ 19-20).

Appendix C

On August 6, 1996, McCarty, acting at Crowell's direction, confirmed Plaintiff's termination. (Stip. ¶ 21). On October 21, 1996, Plaintiff requested a grievance arbitration hearing. (Stip. ¶ 22). This hearing was convened on February 25, 1997, but before it was concluded the parties reached a settlement agreement. (Stip. ¶¶ 23-24). Plaintiff was reinstated to his position and received back pay, benefits, and seniority for the period from July 18, 1996 (the date of his guilty plea) to the date of reinstatement. (Stip. ¶ 24). The parties entered into the settlement without prejudice to their rights. (Stip. ¶ 25).

Plaintiff commenced this action on September 3, 1997, alleging a violation of his due process rights. On November 14, 1997, we granted in part a motion to dismiss filed by Defendants, dismissing certain defendants from the case, and dismissing Plaintiff's claims arising from his suspension on September 6, 1995. Remaining in the case are Plaintiff's claims against Defendants McCarty and Crowell, arising from the October 17, 1995 decision to terminate his employment. The parties have filed cross-motions for summary judgment, and have entered into a Stipulation of Facts.

II. *Standard of Review*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106

S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 553 (1986). Summary judgment must be entered in favor of the moving party "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. . . ." *Id.*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted).

When a moving party has carried his or her burden under Rule 56, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . ." *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted). The nonmoving party "must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment," and cannot "simply reassert factually unsupported allegations contained in [the] pleadings." *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). "If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986) (citations omitted).

III. *Discussion*

A state employee who may be dismissed from employment only for cause has a due process right under the Fourteenth Amendment to notice and a hearing

concerning a suspension or dismissal. *Gilbert v. Homar*, 117 S. Ct. 1807, 1811, 138 L. Ed. 2d 120, 126 (1997). Precisely how this right must be administered will depend on the balancing of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Id. at 1812, 138 L. Ed. 2d at 128 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976)).

While the Fourteenth Amendment will generally require a pre-deprivation hearing, certain circumstances will justify employer action without prior notice or opportunity to be heard. *Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128-29. Following *Gilbert*, we found that Defendants' suspension of Plaintiff without a pre-deprivation hearing did not violate his due process rights, in light of the significant governmental interests which are implicated when a peace officer is charged with a serious crime. (Nov. 14, 1997 Mem. at 5-8).

Defendants now argue that their decision to terminate Plaintiff without a pre-deprivation hearing was similarly justified. Plaintiff, in turn, argues that Defendants' failure to provide him with notice and an opportunity to be heard

prior to his termination constitutes a violation of his Fourteenth Amendment rights as a matter of law. We will weigh these arguments under the *Matthews* test.[1]

Once Plaintiff was suspended on September 6, Defendants' options in handling his case were limited by Pennsylvania law. Pennsylvania's Civil Service Law provides that no civil service employee shall be suspended for more than thirty working days in one calender year. 7 Pa. Stat. Ann. § 741.803. Because of this provision, Defendants could not simply allow Plaintiff to remain on suspension until the criminal charges pending against him were resolved. Defendants were faced instead with the choice of reinstating Plaintiff to his position while charges were pending against him, or terminating him.

Under these circumstances, Defendants' interest in terminating Plaintiff was extremely high. Returning Plaintiff to active duty while criminal charges for disorderly conduct, resisting arrest, public drunkenness, and criminal mischief were pending against him could seriously undermine public

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1. Defendants suggest that Plaintiff's pursuit of his Fourteenth Amendment claims after having entered into a settlement with his employer constitutes an attempt to take "two bites at the apple," and weighs in favor of dismissal. We find this argument unconvincing. As Defendants acknowledged in the Stipulation of Facts, the parties entered into the settlement without prejudice. (Stip. ¶ 25). If Defendants had wanted to prevent Plaintiff from asserting his Fourteenth Amendment claims in a subsequent civil action, they should have obtained a release of such claims as part of that settlement. Having failed to obtain a release, Defendants can not now complain about Plaintiff's exercise of rights which he reserved under the settlement agreement.

confidence in the integrity of the Capitol Police. While the charges pending against Plaintiff were for misdemeanors, they were for offenses which suggest a disrespect for law and order and a lack of personal discipline. Clearly Defendants had a very significant interest in not reinstating Plaintiff. *See Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128.

In contrast, it does not appear that Plaintiff's termination significantly altered his interests. Plaintiff's salary and benefits had already ceased as a result of his suspension, and he retained access to the grievance and arbitration procedures which eventually lead to the settlement reinstating him. While termination is generally a more severe sanction than suspension, *see Gilbert*, 117 S. Ct. at __, 138 L. Ed. 2d at 128, Plaintiff's termination had little practical effect on his interests once he was suspended without pay.

Finally, we must consider the risk of an erroneous deprivation, and the probative value of additional or substitute procedural safeguards. *Id.* at 1812, 138 L. Ed. 2d at 128. Defendants elected to terminate Plaintiff without a pre-deprivation hearing. It is indisputable that no exigency forced them to this decision: Plaintiff was already suspended, and Defendants had ample notice that the Civil Service Law limited his suspension to thirty working days. Defendants certainly could have provided Plaintiff with some form of notice and an opportunity to be heard prior to his termination.

It is not clear, however, whether there would have been any point to such a procedure. Even if Defendants had

conducted a hearing prior to deciding how to proceed in Plaintiff's case, they still would have been faced with a choice between terminating Plaintiff and reinstating him to active duty while criminal charges were pending against him. No substitute procedures could have eliminated the potential damage to the Governmental interests posed by reinstatement.[2] The Governmental interest at issue was not merely keeping Plaintiff from active duty if he was in fact guilty of the offenses with which he had been charged, but also the threat to public confidence in law enforcement posed by the spectacle of a peace officer defending such charges against him in criminal court while on active duty. No pre-deprivation hearing could possibly have prevented such threat; from Defendants' point of view, the only possible option was to terminate Plaintiff. If the charges against Plaintiff were ultimately resolved in his favor, Defendants would retain the option of reinstating Plaintiff. Indeed, this is precisely what happened, with Plaintiff receiving back pay, benefits, and seniority retroactively to the date upon which the most serious charges against him were dropped.

We conclude, therefore, that Defendants' conduct satisfies the *Mathews* test; Plaintiff's due process rights were

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2. It is questionable whether a pre-termination hearing would have afforded Plaintiff any additional protection, as Plaintiff had already begun the grievance and arbitration process under the collective bargaining agreement before he was terminated. *See Tweedall v. Fritz*, __ F. Supp. __, __, 1997 WL 797672, at *6 (S.D. Ind. Dec. 19, 1997); *Dykes v. SEPTA*, 68 F.3d 1564, 1571-72 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1434, 134 L. Ed. 2d 556 (1996).

not violated by his termination. This conclusion is, of course, largely a product of the unique and very public duty of law enforcement officers in our society, the nature of the particular offenses with which Plaintiff was charged, and the quandary faced by Defendants as a result of the limitation placed on their use of suspension as a form of discipline by 7 Pa. Stat. Ann. § 741.803. Under the specific and particular facts of this case, Defendants are entitled to summary judgment.

We will issue an appropriate order.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: March 2, 1998

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

ORDER

AND NOW, this 2nd day of March, 1998, it is Ordered that:

1. Plaintiff's motion for summary judgment, filed January 15, 1998 (Doc. No. 14), is **denied**.

2. Defendants' motion for summary judgment, filed January 15, 1998 (Doc. No. 16), is **granted**. The Clerk of Court shall enter judgment in favor of Defendants and against Plaintiff, and shall close the file.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED MARCH 2, 1998

United States District Court
MIDDLE DISTRICT OF PENNSYLVANIA

CASE NUMBER: 1:97-CV-1342
Judge Caldwell

ALAN D. BOLINGER, JR.,

Plaintiff

v.

THOMAS J. RIDGE; GARY E. CROWELL; JOHN R. McCARTY; GREGORY C. SANTORO; GREGORY A. GREEN: THOMAS G. PAESE AND PAUL A. TUFANO, individually and in their capacity as employees of the COMMONWEALTH OF PENNSYLVANIA

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of the defendants, Thomas J. Ridge, Gary E. Crowell,

Appendix D

John R. McCarty, Gregory C. Santoro, Gregory A. Green, Thomas G. Paese and Paul A. Tufano, and against the plaintiff, Alan D. Bollinger, Jr.

March 2, 1998
Date

Mary E. D'Andrea
Clerk

s/ George T. Gardner
(By) Deputy Clerk
George T. Gardner

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED NOVEMBER 14, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

MEMORANDUM

This is a civil rights action, arising from alleged due process violations in Plaintiff's suspension without pay, and subsequent termination, from his position as a Capitol Police Officer. Before us is Defendants' motion to dismiss.

I. *Background*

Plaintiff is an officer of the Capitol Police, employed by the Pennsylvania Department of General Services

("DGS"). Defendant Thomas J. Ridge is the Governor of Pennsylvania. Defendant Gary E. Crowell is the Secretary of DGS. Defendant John R. McCarty is Deputy Secretary for Administration of DGS. Defendant Gregory C. Santoro is Chief Counsel for DGS. Defendant Gregory A. Green is Director of Personnel for DGS. Defendant Thomas G. Paese is Secretary of Administration for the Commonwealth. Defendant Paul A. Tufano is General Counsel for the Commonwealth.

On September 3, 1995, Plaintiff was arrested at his home and charged with misdemeanors including disorderly conduct, resisting arrest, public drunkenness, and criminal mischief. On September 6, 1995, McCarty, acting under the direction of Crowell, suspended Plaintiff without pay.

On September 14, 1995, Plaintiff's union filed a grievance on his behalf. McCarty denied the grievance on September 29, 1995.

McCarty, again at Crowell's direction, terminated Plaintiff on October 17, 1995. The union filed a grievance in response on October 27, which was denied by McCarty on November 7.

On May 21, 1996, the Bureau of Labor Relations denied several subsequent grievances filed by Plaintiff protesting his termination. On June 6, 1996, Plaintiff gave notice of his desire to have the matter submitted to arbitration.

Plaintiff entered into a plea agreement resolving the pending misdemeanor charges on July 18, 1996. Under that

agreement, Plaintiff pled guilty to a summary offense of harassment, and the other charges were dropped.

On August 6, 1996, McCarty, acting at Crowell's direction, confirmed Plaintiff's termination. On October 21, 1996, Plaintiff requested a grievance arbitration hearing. This hearing was convened on February 25, 199, but before it was concluded the parties reached a settlement agreement. Plaintiff was reinstated to his position and received back pay, benefits, and seniority for the period from July 18, 1996 to the date of reinstatement.

Plaintiff then filed this action against Defendants under 42 U.S.C. § 1983, seeking damages for the period from September 6, 1995 (the date of his suspension) through July 18, 1996 (the date of the plea agreement, and the effective date of his reinstatement). Plaintiff alleges that Defendants deprived him of his due process rights under the Constitutions of Pennsylvania and of the United States, by suspending and then terminating him without notice or an opportunity to be heard. Defendants have moved for dismissal under Fed. R. Civ. P. 12(b)(6).

II. *Standard of Review*

When considering a motion to dismiss under Rule 12(b)(6) "all facts alleged in the complaint and all reasonable inferences that can be drawn from them must be accepted as true." *Malia v. General Elec. Co.*, 23 F.3d 828, 830 (3d Cir. 1994). The motion must be denied unless the plaintiff cannot prove any facts in support of the claim which

would entitle it to relief. *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989).

III. *Discussion*

Defendants argue that the complaint should be dismissed, as it fails to state a claim for a violation of Plaintiff's due process rights. In the alternative, Defendants argue that the complaint should be dismissed as to Ridge, Santoro, Green, Paese, and Tufano, as none of these defendants are alleged to have had any personal involvement in Plaintiff's suspension and termination.[1]

A. Violation of Plaintiff's Due Process Rights

A state employee who may be dismissed from employment only for cause has a due process right under the Fourteenth Amendment to notice and a hearing concerning a suspension or dismissal. *Gilbert v. Homar*,

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1. We need not separately consider the implications of Plaintiff's claims under the Pennsylvania state constitution. Plaintiff has not opposed Defendants' argument that these claims do not state an independent cause of action, and we therefore consider this argument to be unopposed. *See* M.D. Pa. R. Civ. P. 7.6. Furthermore, we can not consider any possible differences between the Federal and the Pennsylvania constitutions, as the parties have not addressed these differences squarely in their briefs. *Showers v. Spangler*, 957 F. Supp. 584, 589 (M.D. Pa. 1997); *Commonwealth v. Edmunds*, 586 A.2d 887, 894-95, 526 Pa. 374, 586 (1991).

Similarly, we will consider Defendants' substantive due process argument to be unopposed pursuant to Local Rule 7.6.

117 S. Ct. 1807, 1811, 138 L. Ed. 2d 120, 126 (1997). Precisely how this right must be administered will depend on the balancing of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Id. at 1812, 138 L. Ed. 2d at 128 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976)).

We will consider separately Defendants' action in suspending Plaintiff without pay on September 6, 1995, and the decision to terminate Plaintiff's employment on October 17, 1995.

1. The September 6, 1995 Suspension Without Pay

The balancing of the *Mathews* factors is illustrated by the Supreme Court's recent decision in *Gilbert*. That case involved the suspension of a university police officer following his arrest for a felony offense. The Court held that while such an employee is generally entitled to a hearing prior to suspension, 117 S. Ct. at 1811, 138 L. Ed. 2d at 126; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494, 506 (1985), the Governmental interests implicated when a peace officer

has been charged with a felony will permit the employer to immediately suspend the officer without violating his due process rights, so long as he is afforded a reasonably prompt post-suspension hearing. *Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128-29.

Relying on this conclusion, Defendants contend that Plaintiff has suffered no violation of due process. They argue his suspension followed his arrest and the filing of criminal charges against him, and that his union's grievance and arbitration procedure provided an adequate post-suspension opportunity to be heard.

In response, Plaintiff contends that *Gilbert* does not apply to a peace officer who has been charged with misdemeanors, rather than felonies, and that Plaintiff was not provided an adequate post-suspension hearing.

While the Governmental interests implicated may be lessened when the employee in question is charged with misdemeanors, rather than felonies, they are still substantial. When, as here, a police officer is charged with offenses which seriously undermine the public trust placed in peace officers, such as disorderly conduct, resisting arrest, public drunkenness, and criminal mischief, the employer's interest in maintaining public confidence in the integrity of law enforcement will justify immediate suspension, without any pre-suspension hearing. *See Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128.

Under *Gilbert*, Plaintiff was nonetheless entitled to a "sufficiently prompt postsuspension hearing." *Id.* This

requirement is satisfied by the grievance and arbitration procedure provided for in Defendant's collective bargaining agreement with Plaintiff's union:

> Where a due process claim is raised against a public employer, and grievance and arbitration procedures are in place, we have held that those procedures satisfy due process requirements, even if the hearing conducted by the Employer was inherently biased.

Dykes v. SEPTA, 68 F.3d 1564, 1571 (3d Cir. 1995) (quoting *Jackson v. Temple Univ.*, 721 F.2d 931, 933 (3d Cir. 1983)) (quotation marks, brackets, and ellipsis omitted), *cert. denied*, 116 S. Ct. 1434, 134 L. Ed. 2d 556 (1996). So long as the grievance procedure in place contains structural safeguards to ensure fairness, it will suffice to protect the employee's due process rights. *Dykes*, 68 F.3d at 1572.

Plaintiff advances no meaningful challenge to the fairness of the grievance procedure, arguing only that it was not sufficiently prompt. (*See* Pl. Brief at 12). We find this allegation to be unsupported by the record. Plaintiff filed a grievance within one week of his suspension; that grievance was decided one week later. While the arbitration hearing which ultimately lead to the resolution of Plaintiff's grievances did not take place until almost eighteen months after his suspension, the initial consideration of the grievances themselves was sufficiently prompt to protect Plaintiff's due process rights.

Defendants were entitled under the circumstances to suspend Plaintiff without a pre-suspension hearing, and the

grievance and arbitration procedure provided Plaintiff with a Constitutionally sufficient manner in which to be heard. Plaintiff has failed to state a claim with regard to his initial suspension.[2]

2. The October 17, 1995 Termination

Defendants' decision to terminate Plaintiff, on the other hand, presents a different problem. Because Plaintiff had already been suspended without pay, Defendants did not face the same set of exigencies calling for immediate action that was presented at the time of his suspension. Under *Gilbert*, Plaintiff had a right to notice and a hearing before his suspension was converted into a termination.

The presence of available grievance procedures will not excuse Defendants' failure to provide Plaintiff with a pre-termination hearing. *Gilbert* expresses a clear preference under the Fourteenth Amendment for notice and an opportunity to be heard *prior* to the adverse employment decision. 117 S. Ct. at 1811, 138 L. Ed. 2d at 126. Departure from this standard must be justified by circumstances which shift the balance of the three *Mathews* factors. *Id.* at 1812-14, 138 L. Ed. 2d at 127-30.

The first of these factors is the effect of the termination on the employee's interests. *Gilbert*, 117 S. Ct. at 1812.

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2. Plaintiff's reliance on the procedures outlined in the Governor's Code of Conduct, 4 Pa. Code §§ 7.174-7.176, is misplaced, because the Code of Conduct creates no substantive or procedural rights. *Werner v. Zazyczny*, 545 Pa. 570, 581, 681 A.2d 1331, 1336-37 (1996).

138 L. Ed. 2d at 128. Termination has a more significant impact on an employee's interests than suspension without pay. *See id.* at 1813, 138 L. Ed. 2d at 128. It is not clear from the record whether or not Plaintiff continued to receive benefits and to accrue seniority while suspended; for purposes of a motion to dismiss, we will construe the facts against the movant, and assume that he did. *See Malia*, 23 F.3d at 830. Termination ended Plaintiff's receipt of these benefits. In any event, termination represents a significant change in the employment relationship. Plaintiff's termination, even while suspended without pay, had a significant impact on his interests.

The second *Mathews* factor is the risk of erroneous deprivation, and the probative value of substitute procedural safeguards. *Gilbert*, 117 S. Ct. at 1812, 138 L. Ed. 2d at 128. While the risk of erroneous deprivation at the time of Plaintiff's termination was the same as it was at the time of his suspension, we must also weigh the presence at this stage of alterative safeguards: an internal DGS inquiry, or merely awaiting the outcome of the criminal proceedings.

The importance of these alternatives is clear in light of the final *Mathews* factor: the governmental interest. *Id.* at 1812, 138 L. Ed. 2d at 128. Unlike the substantial governmental interest at stake at the time of suspension, the Commonwealth's interest in terminating Plaintiff, after he has been suspended, is minimal. When an officer is suspended without pay, confidence in law enforcement is protected: the public need not fear that the Government is actively employing officers who lack respect for the law, and need not be concerned that public funds are going to support such officers while they are being investigated.

Considering Plaintiff had been suspended without pay, we conclude that Defendants have failed to show that the *Mathews* balancing would support his termination without some prior notice and hearing. Defendants are not, therefore, entitled to summary judgment on Plaintiff's claim concerning his termination.[3]

B. Absence of Personal Involvement

Defendants also maintain that Plaintiff has failed to state a claim upon which relief may be granted against Defendants Ridge, Santoro, Green, Paese, and Tufano, based upon the absence of any personal involvement on their part in the employment decisions that were made. Plaintiff responds that all of the Defendants played a role in his suspension and subsequent termination.

A governmental official may not be found liable under Section 1983 via *respondeat superior*. *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 263 (3d Cir. 1995); *Baker v. Monroe Township*, 50 F.3d 1186, 1190-91 (3d Cir. 1995). To establish liability, Plaintiff must show that each defendant was either personally involved in the conduct giving rise to the cause of action, or knew of the misconduct and approved of it. *Blanche Road*, 57 F.3d at 263.

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3. It is possible that the submission of Plaintiff's September 14, 1995 grievance, protesting his suspension, provided a constitutionally sufficient opportunity to be heard prior to his termination. However, we have no facts before us at this stage of the proceedings upon which we could base an assessment of the grievance process, and we must assume for purposes of Defendants' motion that it was inadequate to protect Plaintiff's Fourteenth Amendment rights.

Appendix E

Plaintiff has failed to state a claim against Ridge, Santoro, Green, Paese, and Tufano. The complaint does not allege that any of these defendants had any personal involvement whatsoever in the alleged misconduct, or that any of them knowingly approved of it.

Plaintiff argues that each of these defendants played a role in his firing, by virtue of each's role in the administrative process. We may dispose of these arguments as to Defendants Green and Ridge most easily. Plaintiff argues that Green, as Director of DGS, has ultimate responsibility for personnel decisions within the Department, and that Ridge, as Governor, has ultimate responsibility for the implementation of the Governor's Code of Conduct ("GCC") (which outlines the administrative procedures applied when a state employee is the subject of criminal charges). These are plainly traditional *respondeat superior* arguments, and are insufficient to give rise to liability under Section 1983.

With regard to Santoro, Plaintiff argues that as Chief Counsel to the DGS, he had a responsibility under the GCC to protect Plaintiff's rights during the administrative process. The GCC provides that the Chief Counsel *may* assist the agency head in his investigation of criminal charges against an employee. 4 Pa. Code § 7.175(2). This language, however is discretionary; we can not infer from this that Santoro necessarily *did* assist Crowell and McCarty in investigating the charges against Plaintiff. As the complaint contains no allegations of personal involvement by Santoro, we conclude that it has failed to state a claim against him under Section 1983.

Finally, Plaintiff argues that Paese, as Secretary of Administration, and Tufano, as General Counsel, had a responsibility under the GCC to review the final agency decision, and ratify it absent an abuse of discretion. *See* 4 Pa. Code § 7.176(c). The complaint, however, contains no allegations regarding the manner in which Paese and Tufano preformed this function. Absent some allegation that these defendants either personally engaged in misconduct which infringed Plaintiff's constitutional rights, or knowingly ratified misconduct by others, their role in the administrative process will not be sufficient to give rise to liability under Section 1983. *Blanche Road*, 57 F.3d at 263.

IV. *Conclusion*

Plaintiff has failed to state a claim based on his initial suspension and his claims arising from that suspension must be dismissed. Furthermore, Plaintiff has failed to state a claim against Ridge, Santoro, Green, Paese, and Tufano, and his claims against those Defendants must be dismissed.

Remaining in this case, therefore, are Plaintiff's claims against Defendants McCarty and Crowell, arising from the October 17, 1995 decision to terminate his employment.

We will issue an appropriate order.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: November 14, 1997

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

ORDER

AND NOW, this 14th day of November, 1997, upon consideration of Defendants' motion to dismiss, filed September 10, 1997 (Doc. No. 3), it is Ordered that the motion is **granted in part** and **denied in part:**

1. Plaintiff's claims arising from his suspension on September 6, 1995 are **dismissed.**

2. Plaintiff's claims against Defendants Ridge, Santoro, Green, Paese, and Tufano are **dismissed.**

s/ William W. Caldwell
William W. Caldwell
United States District Judge